No. 1321

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

AMERICAN BONDING COMPANY OF BALTIMORE, a corporation,
Plaintiff in Error,
vs.
J. C. MILLS, JR., late Sheriff of Boise County, Idaho,
Defendant in Error.

AMERICAN BONDING COMPANY OF BALTIMORE, a corporation,
Plaintiff in Error,
vs.
WILLIAM FINNEY, late Sheriff of Blaine County, Idaho,
Defendant in Error.

BRIEF OF DEFENDANTS IN ERROR.

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STATEMENT.

The above actions were brought to recover upon indemnity bonds in the respective cases upon which the defendant, the American Bonding Company, was surety. The facts are so nearly alike in both cases that we follow the example of the counsel for plaintiff in error and file one brief. The record to which we will refer, however, unless otherwise designated, is the record in the Mills case.

One Ralph Cowden was the owner of a certain band of sheep described in the transcript. About July 26, 1902, the Flato Commission Company, claiming to have a mort-

gage on said sheep executed by one R. L. Shaw, commenced proceedings by affidavit and notice under the statute to foreclose said mortgage. The statute under which they proceeded reads as follows:

"Section 3391. In proceedings to foreclose by notice and sale, the mortgagee, his agent or attorneys, must make an affidavit stating the date of the mortgage, the names of the parties thereto, a full description of the property mortgaged and the amount due thereon. Said affidavit must be placed in the hands of the sheriff together with a notice signed by the mortgagee, his agents or attorneys, requiring such officer to take the mortgaged property and sell the same."

Under the proceeding thus provided for, the sheriff took possession of the sheep in question. About August 9, 1902, Cowden, the real owner of the sheep, brought action in the State court to recover possession of the same or the value thereof. This action was against J. C. Mills, one of the defendants in error herein (Trans. p. 212). This action resulted in judgment in favor of Cowden and against Mills and Finney respectively. Upon appeal the judgments were affirmed.

At the time the sheriff was requested to take the sheep under the foreclosure proceedings, the Flato Commission Company furnished an indemnity bond to the sheriff, a copy of which is found in the record (Trans. p. 25). Upon these bonds the plaintiff in error was surety. The bonds were executed and delivered upon the same date the affidavit for foreclosure was sworn to and delivered to the sheriff (Finney case, Trans. pp. 21-194).

The judgment against the sheriff not being paid, the said sheriff commenced this action in the State court on the 12th day of May, 1904, to recover the amount of judgment theretofore recovered against him, such action being based

upon this indemnity bond (Trans. p. 20). The American Bonding Company and the Flato Commission Company were both made parties defendant. On May 27, 1904, the American Bonding Company appeared in the State court by general demurrer (Trans. p. 33). At the same time the bonding company alone filed its petition and bond for removal to the Federal court. (Trans. p. 30.) The defendant, the Flato Commission company, did not join in this petition for removal. The cause was remanded to the State court September 22, 1904. (Trans. p. 34.)

November 26, 1904, and after the cause was remanded, the defendant, the American Bonding Company, appeared in the State court and argued the demurrer, which was overruled. (Trans. p. 35.) It thereupon asked for and secured an extension of time in which to file answer in the State court. (Trans. p. 35.) The answer of the said bonding company was filed in the State court December 12, 1904. (Trans. p. 42.) February 4, 1904, the American Bonding Company again filed its petition and bond for removal to the Federal court. (Tran. p. 54.) The case was again remanded to the State court. The cause proceeded to trial in the State court and judgment was given to the plaintiff in the said State court. On February 16, 1904, the defendant petitioned for removal the Federal court at last determined to retain jurisdiction.

The cause was tried in the Federal court, a jury being waived, and judgment was given for the plaintiff for the amount of the judgment and interest and costs which had been recovered against Finney. (Trans. p. 219.)

Argument.

Jurisdiction.

The record discloses that the lower court was wholly without jurisdiction to hear and determine this case—

that the case was never properly removed to the Federal court. The plaintiff in error filed its demurrer and appeared in the State court May 27, 1904. (Trans. p. 33.) True, at the same time it filed its petition for removal but the cause was remanded to the State court September 22, 1904. (Trans. p. 39.) The cause therefore stood precisely as if no attempt to remove had been made. There could be no virtue in the unsuccessful attempt to remove. In other words, the State court had jurisdiction the same as if no petition for removal had at any time been filed. This being true, the plaintiff appeared in the State court, argued the demurrer to the sufficiency of the complaint December 26, 1904, which demurrer was overruled. The plaintiff in error then asked for and secured a signed stipulation for time to answer. An answer was filed December 12, 1904. (Trans. p. 42.)' On January 25th, in open court, the cause was set for trial by consent of both parties for February 4, 1905. (Trans. p. 85.) On February 4, 1905, a second petition for removal was presented. (Trans. pp. 55-60). The Federal court heard this immediately and the cause was again remanded—the grounds for remanding in both cases being that but one defendant had joined in asking for removal. February 16, 1905, was set for trial, the cause being called in the State court another petition for removal was presented. The State court tiring somewhat of this perpetual motion proceeded to trial, and verdict and judgment was rendered against the plaintiff in error in the State court. Upon this last petition for removal the Federal court finally concluded to retain the case.

From May 27, 1904, until February 16, 1905, this case was in the State court, and the plaintiff in error had submitted itself to the jurisdiction of that court. It had filed a demurrer, appeared and argued the same, took stip-

ulation to answer and filed its answer and consented to setting the case for trial. This was all without protest. (Trans. pp. 78-85.) We say that the fact that they made two attempts to remove wholly without the statute upon removal did not help them. They could derive no advantage or benefit for the final act of removal by prior attempts which were wholly insufficient. Therefore, upon February 16, 1905, they stood precisely in the same situation in the eye of the law as if they had never complained or attempted to get away from the jurisdiction of the State court. As we have stated, the case was remanded twice because both of the defendants did not join. When February 16th arrived one of the defendants could not join—its right to removal had passed. It had appeared once before. The removal act does not provide that a defendant may remove at the time of the appearance of an associate defendant. Each defendant's right to remove must depend upon the status of each at the time of appearance.

The petition for removal must be filed as soon as the defendant is required to appear in the State court, and if not filed at that time and motion to remand is made and denied, the judgment of the Federal court will be reversed with instructions to remove the cause to the State court.

Gerling vs. B. & O. Ry. Co. 151 U. S. 673.

Baltimore & O. R. Co. vs. Burns, 124 U. S. 673.

In the case below it is said: "Confessedly, Wessenberg lost his right to a removal by failing to make the application in time and as Fletcher can not take the case from the State court unless Wessenberg joins with him, it follows that he is subjected to Wessenberg's default." In this case the bonding company had lost its right to remove by the time its associate defendant had appeared, and as the Flato Commission Company could not remove without

the joinder of the Bonding Company no removal could be had.

Fletcher vs. Hamlet, 116 U. S. 408.

Manning vs. Amy, 140 U. S. 137.

A separable controversy is not introduced into the case by separate defenses, and the fact that one of the defendants is in default does not change the situation and entitle the contesting party to remove.

Putnam vs. Ingraham, 114 U. S. 57.

Wilson vs. Oswego Township, 151 U. S. 56.

Where there is no separable controversy and one of the parties fails to exercise his right to remove within the time prescribed, a subsequent joint application for removal will not avail.

Abel vs. Book, 120 Fed. 47.

All the defendants must unite in a petition for removal.

Chicago Rock Island Co. vs. Martin, 178 U. S. 245.

Bill of Exceptions.

The Court will observe that there is no bill of exceptions settled in this case and it is very doubtful if there are any of the questions preserved for presentation to this Court. Certainly the only possible question that could be considered is the sufficiency of the demurrer resting alone on the validity of the bonds. All of the other numerous assignments of error can not avail in the condition in which the record is found.

Only such rulings during the progress of the trial as are saved in a bill of exceptions will be considered on appeal.

Grayson vs. Lynch, 163 U. S. 468.

Pomeroy's Lessee vs. Bank, 68 U. S. 592.

The bill of exceptions must affirmatively show the errors alleged, timely objections and grounds clearly stated.

Newman vs. Company, 80 Fed. 228.

N. C. Ry. Co. vs. St. John, 85 Fed. 806.

We next call attention to the condition of the record with reference to preserved exceptions sought to be taken. The Court will observe that there is no bill of exceptions in the record. The only exception it would seem available here would be the exception taken in the overruling of the demurrer.

Graham vs. Bayne, 59 U. S. 60.

The rulings of the Court in admitting or rejecting evidence can only be considered when brought to this Court by bill of exceptions.

Suydan vs. Williamson, 61 U. S. 427.

Starn vs. States, 94 U. S. 76.

Neither depositions nor affidavits, though appearing in the transcript, can be regarded as a part of the record unless preserved by bill of exceptions.

Baltimore Co. vs. Trustees, 91 U. S. 127.

Bond Valid.

Assuming that the record is in such condition that the Court will consider the errors assigned or some of them, we will endeavor to meet the questions upon their merit.

The first principal question presented is: Was this bond upon which suit is brought a valid bond—such as the sheriff had a right to take? The objection to the bond as attempted to be made is that it was extorted "colore officii" and therefore void. In other words, that it was a case in which the sheriff was protected by process fair upon

its face and one which it was his duty to execute under the law without a bond (Trans. p. 188).

We contend that this bond meets in every particular the essentials of a valid common law bond or obligation. It will be observed that the complaint alleges that upon a certain day the sheriff took possession of certain property and that after taking possession of the same the said sheep were claimed by one Ralph Cowden. That thereupon and after such claim was made the said Flato Commission company, at whose instance the sheep were taken, in order to secure the sale of the same, entered into and gave the indemnity bond in question whereby it was agreed to save the said sheriff harmless by reason of the sale of said property, and from all liability. It then appears by the complaint that said Cowden afterwards commenced suit for the recovery of said sheep, or the value thereof, and judgment was rendered against the sheriff for the value of the same. This judgment is conclusive upon the question that the sheriff had no right to sell these sheep belonging as they did to Ralph Cowden. The simple question therefore is: The sheriff had possession of certain property which he, in fact, had no right to sell under the mortgage because the judgment has established that fact; nevertheless, the party who held the mortgage claimed that they should be sold and agreed that if he would sell them he, the sheriff, should be protected. This was a subject about which they had a right to contract. The consideration is apparent and conclusive and they voluntarily entered into an agreement whereby the sheriff was to be protected. Assuming that it was not a statutory bond, still it was not prohibited by statute or public policy and was concerning the subject about which the parties had a perfect right to make an agreement. It served its purpose, it enabled the party giving the bond to secure a sale of the

property which the sheriff otherwise would have been justified in not selling for the reason that it belonged to a third party. In other words while the officer was proceeding in good faith a question as to ownership arose and he had a right to protect himself.

We also call attention to the recitals of the bond which under all the authorities are binding and conclusive as against the surety. The bond recites the taking possession of the sheep under chattel mortgage given by one R. L. Shaw; the claiming of the sheep by a third party and the demand of the mortgagee for sale notwithstanding the claim (Trans. p. 25). These recitals taken in connection with the judgment, which is conclusive that the property did not belong to Shaw and was not covered by mortgage, furnish ample consideration for the bond. But in addition to this, as we said before, the bond served its purpose. The object for which it was given, to secure the sale of property, was accomplished.

We call attention to the manner of giving the bond. The bond bears date July 22, 1902. The affidavit for foreclosure bears date the same day (Trans. pp. 21, 194, Finney case).

Mr. Finney, the sheriff, states that the bond was given to him at the time they sent the papers on foreclosure (Trans. p. 184).

In the case below it was held that the bond, though not a statutory bond, was binding as a common law obligation.

"The object of the undertaking and its purport is too plain to admit of controversy. There is no question but what it is founded upon a valid, legal consideration. Why, then, is it not a good common law obligation? The principle is familiar that bonds intended to be taken in compliance with the statutes, although not done so, if entered into voluntarily and founded upon a valid consideration

and do not violate public policy or contravene any statute, will be enforced by common law remedies. * * * The undertaking served its purpose, to secure the release of the property attached, and the defendant is estopped from setting up such irregularities."

Bunneman vs. Wagner, 18 Pac. 843.

In the case below the principle is practically the same as the case at bar. The action was upon an indemnity bond. The sheriff had in his hands a writ of replevin which he was about to execute and before doing so demanded an indemnity bond. It was contended he had no right to ask for this and it was void for want of consideration. The Court said: "It is admitted that the bond is not a statutory bond in an action for replevin. On this appellants make their third point, which is that appellee as sheriff had no right to demand or receive this bond and no right to recover on it even admitting it was duly executed by appellants. To this it is answered that the statutes of this state nowhere forbid taking such a bond and if not expressly authorized by statute, it is, nevertheless, a good obligation at common law."

Wolfe vs. McClure, 79 Ill. 564.

The case below is one from the Court of Appeals for the Ninth Circuit. The bond was for the release of property attached but was not in conformity with nor according to the statute and it was claimed that the same was void. The Court said: "The undertaking appears to be valid as a common law obligation. As set forth in the record now before the Court it is under seal and recites as a consideration the release from attachment of all the property attached and the discharge of the attachment.

This was a sufficient consideration for the undertaking."

Ebner vs. Heide, 125 Fed. 683.

Palmer vs. Vance, 13 Cal. 553.

The rule has been universally upheld in the Federal courts that if a public officer demand a bond and the party gives it that it is valid unless the taking of the same is expressly prohibited by law or manifestly contrary to public policy. In the case below the United States, through its officers, demanded a bond covering the duties of a purser in the navy. There were two questions before the court. First, whether or not the United States had power to take a bond except wherein provided by statute. Second, if it did so, would it be extorting the bond under color of office and make the same void. "Upon this posture of the case a question has been made and elaborately argued at the bar how far a bond voluntarily given to the United States and not prescribed by law is a valid instrument binding upon the parties in point of law." The bond was held valid under such conditions.

United States vs. Tingey, 5 Peters, 116.

In another and later case a bond was demanded of an army officer assigned to duty in the signal service. It was conceded that there was no law providing for such bond and further admitted that the officer reluctantly gave said bond demanded by his superior officer, but it was held that the bond was good as a common law obligation, the Court holding that an offer to prove that the bond was given reluctantly and was demanded by the officer was properly rejected, saying:

"We think the evidence was properly excluded, although there was no statute specially providing for the execution of the bond by one occupying the position of Lieutenant

Howgate." The Court further said: "The consideration or condition of the bond must not be in violation of law. It must not run counter to any statute; it must not be either malum prohibitum or malum in se. Otherwise and for all purposes of security a bond may be valid though no statute directs its delivery. * * * It is a voluntary bond when it is not demanded by any particular statute or regulation based thereon and when it is not exacted in violation of any law or valid regulation of the department."

Moses vs. United States, 166 U. S. 571.

In the case below it was held that in order to constitute the taking of a bond under color of office there must appear in the case the element of fraud, oppression or circumvention. If the officer simply demands a bond and the party gives it it is a voluntary bond. The Court said: "There is no allegation or pretense that the bond was unduly obtained by the collector colore officii by fraud, oppression or circumvention. It must therefore be taken to have been a voluntary bond."

Speake vs. United States, 9 Cranch, 27.

"It is alleged as error that the bond in question was not required or authorized by law and was exacted by the commissioner of internal revenue colore officii, and was therefore void. The real question to be determined is whether there was a valid consideration for the bond. No statute directed the commissioner of internal revenue to require, or prescribed the giving of said bond. But it can not be maintained that the bond was not given voluntarily or was exacted colore officii by the commissioner if it was given by the obligor to promote its own convenience."

Diamond Match Co. vs. United States, 31 Fed. 273.

In the case below a county treasurer levied upon certain chattels and advertised them for sale for plaintiff's taxes. The owner executed to the treasurer a bond conditioned for the delivery of said chattels. Held, "That said bond though not authorized by statute is valid as a common law bond and action thereon can be maintained."

Pay vs. Shanks, 56 Ind. 554.

"As a statutory obligation the undertaking was invalid, and upon this undertaking the appellant Webb obtained a stay of proceedings pending the appeal. The undertaking thereby became operative and binding as a common law agreement."

Ryan vs. Webb, 39 Hun. 435.

In the case below the bond was executed conditioned to keep the sheriff indemnified against all damages, etc. "Though the bond might be defective as a statutory bond because not in the form prescribed by statute, it was notwithstanding valid as a common law obligation."

Garretson vs. Reeder, 23 Iowa, 21.

Where parties giving the bond secure what they desire, that is, where the bond serves its purpose, then there is a consideration and the bond is good unless affirmatively prohibited by statute or against public policy.

Healey vs. Newton, 55 N. W. 666.
Lustifield vs. Ball, 61 N. W. 339.
Finley vs. City, 60 Pac. 872.
Larsen vs. Winder, 55 Pac. 563.
Goodwin vs. Bunzl, 6 N. E. 399.

"Plaintiff appears to have acted in good faith in levying upon and selling property pointed out to him. He com-

mitted no willful trespass and there is no reason therefore why the promise to indemnify him should not be enforced."

Lerch vs. Gallop, 8 Pac. 322.

"Where two persons are claiming title to personal property adversely to each other and one of them calls upon a third person to assist in removing it and the assistant has reasonable grounds to believe that his employer is the owner of the property, a promise of indemnity to the assistant is valid in law although it subsequently turns out that the title of the employer was not good and the act of removal was a trespass."

Avery vs. Halsey, 14 Pick. 174.

Nelson vs. Cook, 17 Ill. 443.

It is proper for officers in whose hands writs may be given commanding that they levy upon personal property, to require indemnity in all cases where the ownership of the property to be siezed is in dispute or doubt. In such cases if the writ be regular upon its face and the officer acts in good faith he will be entitled to reimbursement of all damages which he may sustain should the seizure prove to be a trespass. The remedy upon the bond is equally availing whether it be a statutory bond or a voluntary obligation."

Porter vs. Stapp, 6 Colo. 32.

"An officer called upon to serve a process either by attaching property or arresting a person, if there be any reasonable grounds to doubt his authority to act in the particular case, has a right to ask for indemnity. He is not obliged to serve processes in civil actions at his own peril when the plaintiff in the suit is present and may take the responsibility upon himself."

Marsh vs. Gold, 2 Pick. 289.
Train vs. Gold, 5 Pick. 380.
Foster vs. Clark, 19 Pick. 329.

It is certainly well settled that where an officer is engaged in the discharge of his duty and a bona fide question arises as to his right to proceed or as to the ownership of the property which he is asked to seize under process that he may call upon the party asking for the service of the process to protect him by indemnity. And if the party gives the bond and the bond serves its purpose, that is to say, the officer proceeds, it is perfectly valid as a common law agreement. It is only invalid when expressly prohibited by statute or contrary to public policy. In addition to the above authorities, we call the Court's attention to the following authorities:

Anderson vs. Farnes, 7 Blakf. 343.
Forniquet vs. Teagarden, 24 Miss. 96.
Mays vs. Joseph, 34 Ohio St. 22.
Miller vs. Rhoades, 20 Ohio St. 494.
Davis vs. Arledge, 30 Am. Dec. 360.
McCartney vs. Shepard, 64 Am. Dec. 250.
Bordertown vs. Wallace, 11 Atl. 267.

The doctrine is thoroughly settled in the Federal Courts that an officer has the right for his protection to call for a bond in all cases where it is not prohibited by law, and there is no such thing as extorting a bond under color of office, unless there is either fraud or circumvention or demanding in instances where the law prohibits it.

Rogers vs. United States, 32 Fed. 890.
Jessup vs. United States, 106 U. S. 147.
Tyler vs. Hand, 7 How. 573.
United States vs. Hodson, 10 Wallace, 395.
United States vs. Mora, 97 U. S. 413.

The case below is one from the Eighth Circuit Court of Appeals. The bond was given to release certain liens and to prevent the filing of others. The Court said: "Technical objections to the bond as a stautory bond could not be considered. Assuming, but not deciding, that they were well founded, the bond is unquestionably a good common law bond. The rule rests upon the principle that although the instrument may not conform to the special provisions of the statute or regulations with which the party has executed it, notwithstanding it is a contract voluntarily entered into upon sufficient consideration for a purpose not contrary to law. Therefore, it is obligatory upon the parties to it in like manner as any other contract or agreement is held valid at common law. The bond possesses the requisites of a common law bond. It was voluntarily given upon a sufficient consideration for a lawful purpose and is as obligatory upon the makers as if it had conformed with the requirements of the act." The Court further holds in this case that it having appeared that the bond served its purpose and that the parties got the benefit of what they contracted for that as a matter of estoppel they should be prohibited from alleging its invalidity.

Carnegie vs. Hulburt, 70 Fed. 209.
Chadwick vs. United States, 3 Fed. 750.
United States vs. Howell, Fed. cases No. 15405.
United States vs. Garlinghouse, Fed. cases No. 15189.
Taylor vs. Fleckenstein, 30 Fed. 99.

"It was claimed if the bond contained an indemnity against the trespass in taking the property it was void * * * as taken under color of office by public officer. * * * The taking of the bond of indemnity in a case like this is no violation of the statute which prohibits the sheriff or

any other officer from taking any bond, obligation or other security by color of his office in any other case or manner than such as provided by law declaring every bond, obligation or security taken otherwise void. Taking indemnity by public officer is not unlawful, because not expressly authorized by statute. A bond valid at common law is not avoided by such a statute. The words color of office as used in such statute imply an illegal claim of right or authority to take security. Color of office as defined by the law dictionary is champerty, an act wrongfully done by an officer under pretended authority of his office and grounded upon corruption, to which the office is a mere shadow or color."

Griffiths vs. Hardenberg, 41 N. Y. 464.

Burrall vs. Acker, 35 Am. Dec. 582.

The sheriff may lawfully require a bond of indemnity before executing the attachment upon goods in the possession of a third person claiming them as his own. Such a bond was not within the prohibition of color of office.

Chamberlain vs. Beller, 18 N. Y. 115.

Counsel for plaintiffs in error seem to claim that when an officer has a process in his hand regular upon its face and valid in form that whatever he does under this process he is protected. In other words, although the sheriff in this case was asked to take possession of certain property which turned out to belong to another party that still he would have been protected by its process. We have watched curiously for the citation of authorities to this effect. So far as this case is concerned and the decision of our Court, this very case determines that the process is no protection to the sheriff when he takes property which belongs to a third person. In these cases of Cowden vs.

Mills and Cowden vs. Finney both the defendants justified under their processes and according to counsel that ought to have been sufficient to protect them. Notwithstanding this justification, however, when it was shown that the property belonged to Cowden the process was no protection, although valid in form and regular upon its face. Notwithstanding they had a valid process, they have got a judgment against them for many thousands of dollars and that judgment is conclusive in this case.

In the case below the process was regular upon its face. The Court said: "A person other than the defendant named in the writ whose property is wrongfully taken may indeed sue the marshal like any other wrongdoer in the action of trespass to recover damages for the wrongful taking; and neither the official character of the marshal nor the writ of attachment affords him any defense to such an action." So in this case the sheriff was asked to take property which another party claimed. He knew that if it belonged to the other party the process was absolutely no protection to him. He therefore asked for his indemnity, they gave it and it was a perfectly valid obligation. It secured all they asked, the bond served its purpose, the property was taken and sold and the other party was sued.

Lemmon vs. Feusier, 111 U. S. 17.
Derby vs. Gallup, 2 Wallace, 97.
Buck vs. Colbath, 3 Wallace, 334.

The leading case above not only holds the marshal liable but settles, so far as the Federal courts are concerned, that the official bondsmen are liable. If that is true, certainly he had a right to demand indemnity to protect his official bond.

Covell vs. Heyman, 111 U. S. 84.
West vs. Cabell, 153 U. S. 85.
Wise vs. Jefferis, 51 Fed. 644.

In the case below the process was a writ of attachment and the sheriff took property belonging to a third person.

It was held that such a person was a stranger to the writ and was not confined to any particular form of action, that he had a right to take any step or any proceedure which the law left open to him. In other words, he was not compelled to submit to the sheriff's jury or to any statutory mode of determining the right of property. He can select his own forum.

Wise vs. Jefferis, 51 Fed. 644.

The following cases will be found to sustain the principle that where an officer has a process in his hands, although regular in form and valid and takes property which turns out to belong to a third person, that the third person may sue him and his bondsmen in any form of action which he chooses to bring. He may select his own forum and his own kind of action. And neither the official character of the officer nor his process is any protection as against a third party.

Vickery vs. Crawford, 55 S. W. 560.
Rankin vs. Ekel, 1 Pac. 895.
Fox vs. Cronson, 2 Atl. 444.
Appleton Co. vs. Warder, 43 N. W. 791.
Cole vs. Mann, 62 N. Y. 1.
Scudder vs. Anderson, 19 N. W. 775.
Shumway vs. Rutter, 25 Mass. 443.

Recitals of the Bond—Estoppel.

In connection with this proposition as to the validity of the bond and the sufficiency of the complaint founded thereon the matter of the effect of the recitals and the question of estoppel are important. The bond recites among other things that the sheriff did after such notice

and affidavit were given take into his possession certain property which was claimed by other persons as their own and that notwithstanding such claim the said Flato Commission company required the sheriff to retain such property in his possession and sell the same, and that upon his doing so he should be held harmless from all liability by reason of his taking possession and retaining said property. The other recitals of the bond by which the parties are bound and from the disputing of which they are estopped form a complete consideration for this bond. Unquestionably when the property was claimed by other persons and the doubt arose, the sheriff had a perfect right to call for an indemnity before he proceeded. He knew that if the property belonged to other parties the process was no protection and that he would have no protection whatever. He was not bound to take the risk himself; it was perfectly proper for him to protect his official bond himself by indemnity.

"A recital in a bond concludes the parties as an admission of the facts recited."

Healey vs. Newton, 55 N. W. 666.
Am. & Eng. Ency. of Law, Vol. 24, p. 67.
State vs. McDonald, 4 Ida. 468.

In the case below the parties sought to prove that the property attached was not the property of one Hyde, but the Court said: "But their undertaking recites the bringing of the attachment suit, the issuance of the writ of attachment thereon against the defendant Hyde and the attachment of his property, etc. These recitals are as between the parties to the undertaking conclusive evidence of the facts recited."

Pierce vs. Whiting, 63 Cal. 540.

"Whatever an obligor recites in a bond to be true may be taken as true against him and need not be averred in a complaint on such bond nor proved on the trial."

Smith vs. Fargo, 57 Cal. 159.

Bowers vs. Beck, 2 Nev. 150.

In the case below there was a replevin bond given and the case at a subsequent term of the court was continued on condition that the sureties renew the bond. Thereupon one Judson signed his name under the other sureties and upon appeal it was held "that his execution of the bond estopped him from denying the recitals in it which imported that it was executed upon the institution of the replevin suit and taken by the sheriff at a time when it was lawful and proper to take the same."

Decker vs. Judson, 16 N. Y. 439.

"In the construction of bonds and conditions the rule of law is that if the bond be a single one it shall be taken most strongly against the obligor. * * * In the construction of conditions courts will look to the meaning of the parties as far as it can be collected from the instrument itself, and when the intention is manifest will transpose or reject insensible words and supply accidental omissions so as to give full effect to the intention of the party. * * * And when the condition of the bond is preceded by a recital of the explanatory facts if a certain particular thing be referred to, the recital of that fact will be taken as a conclusive admission of it. * * * Where a distinct statement of a fact is made in the recital of a bond, it is not competent for the party bound to deny the recital in an action upon an instrument and between the parties to it."

Murfree on Official Bonds, Sec. 131-2-3.

"It is a well settled rule of law that where a distinct statement of facts is made in the recital of a bond, it is not competent for the party bound to deny the recital in an action upon the instrument and between the parties to it."

Easton vs. Driscoll, 18 R. I. 321.

"It is not competent for the defendants to vary or contradict this recital by parol evidence. It was a substantive part of the agreement and not like the consideration clause of a conveyance or other instrument which may within certain limits be explained and varied by parol.'

Cocks vs. Barber, 49 N. Y. 110.

Payment of Judgment.

The next question presented by the brief of counsel for plaintiff in error is whether or not it is necessary for the sheriff to first pay the judgment recovered against him before he is entitled to sue upon the bond. The language of the bond is clear enough and answers this question itself. The bond says: "The condition of this obligation is such that if the Flato Commission Company of Omaha and the American Bonding and Trust Company of Baltimore City, Maryland, sureties, their heirs, executors, administrators or successors or either of them shall well and truly indemnify and save harmless the said J. C. Mills, etc., of and from all damage, expense, cost and charges and *against* all loss and *liability* which he, the said sheriff, etc., *shall sustain or in anywise be put to*, etc."

It will be seen that the indemnity is against all liability, loss, etc., which he shall sustain. The liability of the sheriff has been established and fixed permanently by the judgment and the judgment is therefore conclusive of his right to recover in this case. The word liability could have no other meaning. The bond does not assume and agree to

pay, it is true, but it does indemnify against liability and the liability is forever established by the judgment.

In the case below, in which the bond was very similar in terms, it is said: "As has been seen the indemnity given the constable was not only against actual damage, etc., but against all liability. Therefore, the moment the judgment was entered in favor of Macbeth & Compton and against the constable the latter became liable for the amount of it and thereupon a cause of action arose in his favor upon the bond."

Macbeth vs. MyIntyre, 57 Cal. 50.

Brodrib vs. Brodrib, 56 Cal. 563.

"It is undoubtedly the rule of the common law courts that to authorize a recovery on mere bond indemnity, actual damage must be shown. If the indemnity be against the payment of money plaintiff is certainly required to prove actual payment or that which the law considers equivalent to actual payment. But it has very generally been held that if the indemnity be not sufficient against actual damage or expense but also against any liability for such damage or expense the party need not wait until he has actually paid the judgment against him but his right of action is complete when he becomes legally liable for damages. This is in strict conformity with the letter of the bond or undertaking, for if the indemnity be good against any liability, clearly when the liability is legally imposed the condition is broken and a right of action is at once created." We invite particular attention to this case both as to the language of the bond and as to the reasoning of the Court.

Jones vs. Childs, 8 Nev. 121.

In the cases below it was expressly decided that where

a bond indemnifies against liability that the liability attaches as soon as the judgment is rendered and that the party is entitled to sue without payment of the judgment.

Tunstead vs. Nixdorf, 22 Pac. 472.

Botkin vs. Kleinschmidt, 52 Pac. 563.

"The undertaking was not against damage merely but was to indemnify against liability by judgment and costs as well. By the general rule of law a covenant to indemnify against a future judgment, charge or liability is broken by the recovery of a judgment or the fixing of a charge of liability in the matter to which the covenant relates."

Conner vs. Reeves, 103 N. Y. 527.

Am. & Eng. Ency of Law, Vol. 16, 2 Ed. 176.

"Where a party has an indemnity not only against actual damage or expense but also against any liability for damage or expense he need not wait to commence suit until he has actually paid such damage; his right of action is complete when he becomes legally liable."

Chace vs. Hinman, 8 Wend. 452.

Webb vs. Pond, 9 Wend. 421.

Carmen vs. Noble, 9 Penn. St. 371.

Fish vs. Dana, 10 Mass. 46.

Douglas vs. Howland, 24 Wend. 36.

Brown vs. Tigon, 92 Fed. 851.

We will not extend this brief by analyzing all of the authorities cited by opposing counsel on this question. We desire to notice some of them, however, and after a careful analysis of the same will say that no one of these cases cited bears directly upon the point sought to be made by counsel for plaintiff in error, while many of them indirectly, if not directly, support our contention.

In Johnson vs. Risk, 137 U. S., the obligation was "to protect and keep said Johnson harmless from the *payment* of any part thereof." In view of such language the reasoning of the court was of course to the effect that payment must be made in order to give rise to an action or right to recover, but no such language is found in this bond. The word payment is omitted and instead thereof the word liability is used. It is simply the question of the interpretation of the plain language of the bond, and the distinction between indemnity against liability and against payment is manifest and elementary.

The case of Wicker vs. Hoppock throws no light upon the subject here involved at all so far as we are able to understand the decision.

The case of Mills vs. Dow, 133 U. S., in so far as it bears upon this question supports our proposition, in fact, a critical analysis of the case leads to the conclusion that it is quite in point. The language of the bond construed in that case is "truly save harmless the said Mills from any liability by reason of the said contracts," etc. Now under this clause the Court expressly holds two propositions:

First. That the party suing upon the bond was entitled to sue as soon as the liability arose and was not compelled to pay the liability before bringing suit. "The agreement to assume the contract in connection with the further agreement to save plaintiff harmless from liability was broken by failure to pay the parties to whom the plaintiff was liable *and it was not necessary* to a breach that the plaintiff should show that he had first paid those parties." This is precisely our contention here upon practically the same language in the bond.

Second. The Court holds that this language constituted an implied contract upon the part of the bondsman to pay the liability, that it was in effect an assumption

of that liability whenever it arose. So, in this case, when the party signed the bond in question to indemnify against liability, the legal effect was just as held in the above case an agreement to pay the liability and remove it, for by no other way can the indemnity be made effective. In other words, if I agree to save A. harmless from liability and a judgment is rendered against A, in order to carry out the terms of that bond I must pay that liability, pay the judgment rendered. There were no words expressly assuming and agreeing to pay in the case of Mills vs. Dow; it was simply the construction which the Court put upon language almost identical with the language at bar. It is, in other words, something more than ordinary indemnity against damage, it is an obligation taken which makes it necessary for the party to stand in the attitude of paying as soon liability arises. In other words, to use the exact language of the Court and making it applicable to the case at bar, the contract is not merely one to indemnify the plaintiff from damage arising out of his liability but is an agreement to assume his contracts and to discharge him from his liability. So our bond here is not one simply to indemnify against damage. That is also provided for, but it is an agreement upon the part of the surety company, as it were, to assume whatever obligations or judgments arose out of the transaction and to take away the liability from the sheriff of discharging the same. We think the case is directly in point in support of our position.

We invite the Court's attention to the case of Taylor vs. Coon, 48 N. W., which sustains in full the contention which we are here making and makes quite clear the distinction between indemnity against liability and in indemnity against loss or damage. The following language is used in the authority: "If it contains an indemnity against *lia-*

bility to pay the endorsed paper there is a breach of the covenant of indemnity *as soon as the liability of the endorser to pay the same is fixed and an averment that he has paid it is not essential to the cause of action.*" Then the Court proceeds to interpret the language of the bond to ascertain whether it is an indemnity against liability alone or whether the language used makes it an indemnity against loss or damage by reason of such liability and says: "In the light of other stipulations in the agreement which so clearly evidence the intention of the parties thereto that the indemnity should only be against loss or damage, we think the subsequent words 'called upon to pay' as employed therein should be construed as the equivalent of 'compelled or required to pay.' " In other words, owing to the fact that there was in the bond much additional language to what is found in the bond at bar with reference to the matter of payment, the Court finally construed it to be an indemnity against loss or damage and a payment had to be made. But suppose the words with reference to payment had not been found in the bond, and they are not in the bond in question, would not this authority be direct to the point that we need not pay before suit and does not the case say, "All this is elementary law."

The case of Thompson vs. Taylor, when examined in the light of the facts and the language of the bond, again supports our position. The language of the bond in that case was as follows: "Shall be liable for and compelled to pay." That portion of the language, "shall be compelled to pay," led the Court to adopt the rule that payment must first be made before suit could be brought, but in its reasoning the Court expressly holds that there is a well recognized distinction between the cases where it is an indemnity against liability and an indemnity against payment. In